In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 821

BENJAMIN INDIVIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, A1-A10) is reported at 352 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1965. A petition for rehearing was denied on November 17, 1965 (Pet. App. B). The petition for a writ of certiorari was filed on Decem-

ber 14, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in admitting petitioner's incriminating statement into evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of forfeiting bail and willfully failing to surrender himself for a felony trial in violation of 18 U.S.C. 3146. He was sentenced to three years' imprisonment (Tr. 134).[1] The court of appeals, sitting *en banc*, unanimously affirmed the conviction.

1. The government's evidence showed that petitioner was released on $60,000 bail on May 16, 1961, in connection with a narcotics indictment. This was reduced to $20,000 on July 31, 1961 (Tr. 14). The bond, which guaranteed petitioner's appearance when called, was forfeited on September 7, 1961, after petitioner failed to appear as directed and failed to respond to a bench warrant (Tr. 17, 80-81; Exs. 13 and 14). Subsequently the bondsman and the Federal Bureau of Investigation unsuccessfully attempted to locate petitioner (Tr. 25-27, 36-43).

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[1] "Tr." refers to the trial transcript which is being lodged with the Clerk of this Court. "A." refers to petitioner's appendix in the court of appeals which is on file with the Clerk of this Court.

On June 29, 1962, the bail-jumping indictment was returned. An arrest warrant was returned unexecuted on July 6, 1962 (A. 1). On May 26, 1964, petitioner was arrested by an agent of the Federal Bureau of Investigation at Kennedy International Airport as he disembarked from a plane arriving from Brazil (Tr. 43-46). At the airport, petitioner stated to the agent that he had been living in Brazil and working as a guide. When asked by the agent why he had jumped bail, he said that (Tr. 47):

> "he had requested a severance from the defendants in the other case and he had been turned down and he did not desire to stand trial with these other men."

2. Prior to trial petitioner filed motions to dismiss the indictment and to suppress all evidence obtained "from the time of his arrest in Brazil until the time of his arraignment in the Southern District of New York" (Tr. 148). The grounds stated in the motions were that the government had "secured jurisdiction over [petitioner's] person through the violation of United States law and international agreement by its agents" and that the evidence had been obtained "during the course of an unlawful arrest, detention, search, seizure and interrogation" (Tr. 142, 148). Supporting affidavits alleged that petitioner had been seized at gunpoint in Brazil by agents of the United States government and had been forcibly abducted to New York in violation of international agreements and a federal statute (Tr. 143-144, 149-150). An answering affidavit of government counsel (filed on the date of

the trial, for which time the motions were set) stated that petitioner had been arrested for illegal entry into Brazil by Brazilian authorities and that he was sent from that country and placed on an airplane destined for New York by representatives of the Brazilian government (Tr. 152).

When the agent of the Federal Bureau of Investigation testified concerning the arrest at Kennedy Airport, petitioner's counsel objected on the ground that "we are now getting into the area covered by the subject matter of my motion" (Tr. 43). The objection was overruled (Tr. 44), and later renewals of the objection "for the reasons covered in my motion" were similarly rejected (Tr. 45, 46, 47). The agent testified that immediately upon arrest he advised petitioner of the charges, of his right to remain silent, and of his right to counsel (Tr. 46; A. 9a). Some time in the course of the conversation, petitioner asked the agent whether he had "seen or heard from an attorney" whom he did not identify. The agent replied that he had not (Tr. 47).[2] Petitioner was brought to F.B.I. headquarters in New York at about 11:15 a.m., and he was taken before a United States Commissioner approximately one and a half hours later (Tr. 48).[3]

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[2] The first notice of appearance on the bail-jumping indictment was not filed until June 8, 1964. Petitioner's trial counsel in the narcotics case had withdrawn, with permission, on May 22, 1961. Petitioner's trial attorney filed a notice of appearance in the narcotics case on May 28, 1964, two days after his arrest in the instant case (Tr. 141).

[3] Petitioner's motion for a new trial was also based on the claim that he had been "falsely arrested and in effect kid-

3. On appeal, petitioner contended that his statements to the agent at the airport were inadmissible under *Massiah* v. *United States*, 377 U.S. 201, which had been decided by this Court five months before petitioner's trial. The court of appeals rejected the contention on the ground that petitioner had failed to assert in the district court the claim that he had been deprived of a Sixth Amendment right (Pet. App. A, A5-A8).

ARGUMENT

1. The record clearly supports the unanimous determination of the *en banc* court of appeals that petitioner failed to assert at any stage of the district court proceedings the constitutional claim that he had been deprived of the assistance of counsel. Petitioner moved to suppress the evidence and objected to its introduction solely on the ground that he had been forcibly abducted and that his statements were the product of that unlawful act. He never argued that the statements were made in violation of rights under the Sixth Amendment. In *On Lee* v. *United States*, 343 U.S. 747, 749-750, n. 3, this Court observed that the rule requiring specific objection is buttressed by the requirement that constitutional issues be raised at the earlies possible stage in the litigation.

The failure to object on this ground prevented the

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naped" (Tr. 133). The court observed that the agent's testimony was unrelated to these charges and that any question of admissibility "under the McNabb case" was foreclosed because no evidence had been submitted on that issue (Tr. 133).

trial court from making any investigation or determination whether petitioner did in fact have an attorney at the time of his statement and whether he knowingly waived his right to consult with counsel. Timely specific objection is required so that the court can make the necessary factual determinations. See *United States* v. *Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 382 U.S. 904; *Lawson* v. *United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States* v. *Ladson*, 294 F. 2d 535, 538-539 (C.A. 2), certiorari denied, 369 U.S. 824.[4]

2. In any event the statement made to the F.B.I. agent in the instant case was distinguishable in various respects from that held inadmissible in *Massiah* v. *United States*, 377 U.S. 201. First, Massiah did not know the role being played by the person to whom he spoke and cannot be said to have knowingly waived the presence of counsel at the challenged conversation. Petitioner, on the other hand, knew he was speaking to an agent of the F.B.I. Second, Massiah was not advised by the informer of his right to remain silent or of his right to have counsel present since he was not told that he was speaking to the police. Petitioner was fully advised of these rights. Third, Massiah had retained counsel before the challenged conversation

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[4] Petitioner's claim that the court of appeals decided the case on a ground which it raised *sua sponte* is refuted by the government's brief in the court of appeals, which was addressed in part to petitioner's failure to make the proper objection at trial. See Brief for the United States, pp. 4-5. Petitioner could have filed a reply brief under Rule 15 of the court of appeals' rules or orally argued this issue.

and government agents were, therefore, required to communicate with the accused through his attorney. Petitioner, however, had no counsel of record at the time of the interview (see note 2, *supra*), and the incidental reference to an attorney was insufficient to require termination of the interview. Fourth, Massiah's was a carefully arranged interrogation in the absence of his attorney. Petitioner's statements were made almost immediately upon his arrest in response to preliminary questions asked as he was being taken into custody. Finally, petitioner was not unfamiliar with the criminal process. In addition to having been advised of his right to counsel, he had previously completed a trial on a narcotics charge which had resulted in a mistrial. In *Escobedo* v. *Illinois*, 378 U.S. 478, 490, n. 14, this Court pointed out that a defendant may intelligently waive his right to counsel after being advised of it. In the instant case the warning was given to a sophisticated defendant who, by answering the question, waived his right. See *Jackson* v. *United States*, 337 F. 2d 136 (C.A.D.C.), certiorari denied, 380 U.S. 935; *United States* v. *Konigsberg*, 336 F. 2d 844, (C.A. 3), certiorari denied, 379 U.S. 933; *Davis* v. *State of North Carolina*, 339 F. 2d 770 (C.A. 4) (en banc); *Hayes* v. *United States*, 347 F. 2d 668 (C.A. 8); *Latham* v. *Crouse*, 338 F. 2d 658 (C.A. 10).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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[5] After the preparation of this brief in opposition we were advised by petitioner's counsel that petitioner died on December 30, 1965. In light of this intervening circumstance, the Court might deem it appropriate to dismiss the petition as moot.

* In lieu of the Solicitor General, who has disqualified himself.

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